71-1636

Supreme Court, U.S.
FILED
JUN 17 1972
E. ROBAK, JR., CLERK

IN THE

# Supreme Court of the United States

NO. _____

M. J. ELLIOTT, Warden
Atmore Prison Farm,

PETITIONER

vs.

LAWRENCE ERSKINE TAYLOR,

RESPONDENT

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

WILLIAM J. BAXLEY
Attorney General of Alabama

RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

Attorneys for Petitioner
250 Administrative Building
Montgomery, Alabama 36104

RESPONSE NOT PRINTED

# INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 2 |
| STATEMENT | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| CONCLUSION | 13 |
| CERTIFICATE OF SERVICE | 14 |
| APPENDIX "A" | 15 |
| APPENDIX "B" | 23 |

## TABLE OF AUTHORITIES

Page

CASES:

*Billingsley v. New Jersey*,
408 F.2d 1181 (1969) ..... 12

*Cunningham v. State*,
231 A.2d 501 (1965, Md.) ..... 12

*Edwards v. State*,
156 N.W.2d 397 (1968, Wisc.) ..... 12

*Escobedo v. Illinois*,
378 U.S. 478, 12 L. ed.2d 977,
84 S. Ct. 1758 ..... 7, 8, 10, 11, 12

*Frazier v. Cupp*,
394 U.S. 731, 22 L. ed.2d 684, 89 S. Ct. 1420 ..... 10, 11

*Johnson v. New Jersey*,
384, U.S. 719, 16 L. ed.2d 882, 86 S. Ct. 1772 ..... 7

*Loray v. Yeager*,
446 F.2d 1360 (3 Cir. 1971) ..... 12

*Miller v. Texas*,
468 S.W.2d 818 (1971, Tex.) ..... 12

*Miranda v. Arizona*,
384 U.S. 436, 16 L. ed.2d 694, 86 S. Ct. 1602 ..... 7

*People v. Doverspike*,
167 N.W.2d 285 (1969, Mich.) ..... 12

*People v. Ranes*,
188 N.W.2d 568 (1971, Mich.) ..... 12

*Sellars v. Beto*,
430 F.2d 1150 (1970) ..... 12

*Short v. State*,
237 N.E.2d 258 (1968, Ind.) ..... 12

## TABLE OF AUTHORITIES—Continued

Page

CASES:

*State v. Carr,*
154 N.W.2d 526 (1967, Neb.) ..... 12

*State v. Funicello,*
231 A.2d 579 (1965, N.J.) ..... 12

*State v. Hopper*
203 So.2d 222 (1967, La.) ..... 12

*State v. Outten,*
206 So.2d 392 (1968, Fla.) ..... 12

*Taylor v. Alabama,*
282 Ala. 567, 213 So.2d 566 ..... 6, 12

*Taylor v. Alabama,*
46 Ala. App. 659, 248 So.2d 154 ..... 6, 7

*Taylor v. Alabama,*
..... Ala. ....., 248 So.2d 156 ..... 7

*Taylor v. Alabama,*
393 U.S. 1102, 21 L. ed.2d 795, 89 S. Ct. 903 ..... 6

*Texas v. Payton,*
390 F.2d 261 (1968) ..... 12

*U.S. v. Childress,*
347 F.2d 448 (1965) ..... 12

*U.S. v. Feinberg,*
383 F.2d 60 (1965) ..... 12

## TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Section 1,
United States Constitution ..... 2

Fifth Amendment
United States Constitution ..... 3

Sixth Amendment,
United States Constitution ..... 3, 7

FEDERAL STATUTES:

Title 28, Section 2254,
United States Code Annotated ..... 6

Title 28, Section 1254(1),
United States Code ..... 2

IN THE

# Supreme Court of the United States

NO._____

M. J. ELLIOTT, Warden
Atmore Prison Farm,

PETITIONER

vs.

LAWRENCE ERSKINE TAYLOR,
RESPONDENT

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, M. J. Elliott, Warden, Atmore Prison Farm, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals For the Fifth Circuit rendered on April 14, 1972, which reversed the decision of the United States District Court, Northern District of Alabama, Southern Division, entered on October 8, 1971, wherein that Court denied a Petition For Writ of Habeas Corpus.

A Petition For Rehearing and a Petition For Rehearing En Banc were denied on May 17, 1972 in the United States Court of Appeals For the Fifth Circuit.

## OPINIONS BELOW

The opinion of the United States District Court For the Northern District of Alabama, Southern Division, has not been reported but is contained in Appendix "B" of this Petition. The opinion of the United States Court of Appeals For the Fifth Circuit has not been reported but is contained in Appendix "A" of this Petition.

The United States Court of Appeals For the Fifth Circuit rendered no opinion in its order denying the Petitions For Rehearing.

## JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, United States Code, Section 1254(1).

## QUESTION PRESENTED

Whether Respondent's incriminating statement to police was improperly admitted into evidence at Respondent's trial for murder, where Respondent had not been warned of his right to remain silent but did not request counsel prior to making the statement and, hence, where Respondent was not denied counsel by police.

## CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions involved are:

A. That part of the Fourteenth Amendment, United States Constitution, Section 1, which states:

"*** nor shall any State deprive any person of life, liberty or property, without due process of law; . . . "

B. That part of the Fifth Amendment, United States Constitution, which reads as follows:

"No person *** shall be compelled in any criminal case to be a witness against himself, . . . "

C. That part of the Sixth Amendment, United States Constitution, which reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right *** to be informed of the nature and cause of the accusation; *** and to have the assistance of counsel for his defense."

## STATEMENT

On Christmas Eve of 1964 the Respondent, Lawrence Erskine Taylor, murdered James W. Rule in Birmingham, Alabama by bludgeoning him on the head between nine and thirteen times with a wooden club commonly known as a "billy stick." Rule met his death at the hands of Taylor while Taylor was participating in a burglary/robbery at Rule's apartment. Early on Christmas morning of 1964, a few hours after he had murdered Rule, Taylor left Birmingham by bus and arrived in Ocala, Florida, where his father lived, on the same day.

On January 13, 1965, Taylor was arrested and confined in the County Jail in Dublin, Georgia in connection with Rule's murder. The Birmingham Police Department contacted the Dublin Georgia's Sheriff's Office to arrange for the extradition of Taylor to be tried on the Alabama murder charge.

Taylor's mother, who was also in Dublin, Georgia, called Birmingham attorney John Golden from Dublin by telephone and informed Golden that Taylor was being held on a first degree murder charge; she hired Golden to represent Taylor in the matter. Golden, who had represented Taylor several times in the past, advised Taylor's mother to have her son waive extradition and further advised her very strongly to instruct Taylor not to make any statement to the police in connection with the charges against him and to instruct him that he could not be required by the police to make any statement whatsoever without first consulting with his lawyer.

On January 15, 1965, Detectives Wallace and Rouse from the Birmingham Police Department drove to Dublin, a distance of approximately four hundred miles, to return Taylor to Birmingham to stand trial on the murder charge. When they arrived in Dublin on the morning of January 15, they questioned Taylor in the Dublin County Jail about the murder charge. At this time Taylor's mother was with him. She told the detectives, while all four were present in the interrogation room, that she had hired a Birmingham lawyer to represent her son, that he had advised her to instruct her son to waive extradition and consent to return to Birmingham with the detectives, but that he should in no event make any statement to the officers. Taylor's mother further stated that she had advised her son of the fact of Golden's representation and the advice given by Golden, and, in the presence of the detectives, she repeated to Taylor the attorney's instructions that Taylor had the right not to make a statement without advice of counsel and that Taylor was not to make any statement to the officers.

At the conclusion of this conversation and after Taylor's mother departed, detectives Wallace and Rouse questioned

Taylor about the murder. Following his attorney's instructions, Taylor declined to answer any questions.

After the formalities of waiving extradition were completed, Taylor left by car for Birmingham in the custody of the two detectives. The four hundred mile trip lasted approximately eight or nine hours; they arrived in Birmingham between 9:00 and 10:00 o'clock P.M. that same day, January 15, 1965. During the trip one detective drove while the other sat in the back seat with Taylor; the detectives alternated behind the wheel. One stop was made to eat in a small Georgia town. The detectives periodically questioned Taylor about the murder, frequently changing the subject and then returning again to questions concerning the murder. It is absolutely not clear from the record evidence in this case as to the length of each period of questioning concerning the murder nor as to the length of the intervals between such questioning. Taylor continued to refuse to discuss the murder until the final half hour of the trip back to Birmingham. Approximately thirty miles from Birmingham, Taylor made oral statements to the detectives detailing his commission of the murder, which statements were introduced, over objection, at his trial in the Jefferson County, Alabama Circuit Court. On the return trip, when the detective questioned Taylor and when he made the inculpatory statements, he did not at any time ever request the presence of his attorney before answering any questions nor did he request consultation with his attorney prior to answering any questions. Taylor was not in any way coerced or threatened during the entirety of the trip. He was not offered any hope of reward to induce him to make any statement nor was he ever told that it would be better for him to make a statement or that it would be worse for him if he did not make a statement.

On May 20, 1965, Taylor was convicted of murder in the second degree in the Circuit Court of Jefferson County, Alabama and sentenced to eighty (80) years in the Alabama state penitentiary.

The conviction was affirmed by the Supreme Court of Alabama on August 15, 1968. *Taylor v. Alabama*, 282 Ala. 567, 213 So.2d 566. No Petition For Rehearing was filed in the Alabama Supreme Court.

On November 4, 1968, Taylor filed in this Honorable Court a Petition For Writ of Certiorari to the Supreme Court of Alabama. Such petition was denied by this Honorable Court on February 24, 1969. *Taylor v. Alabama*, 393 U.S. 1102, 21 L. ed.2d 795, 89 S. Ct. 903.

On March 7, 1969, Taylor filed a Petition For Writ of Habeas Corpus in the United States District Court, Middle District of Alabama, Northern Division. On March 12, 1969, United States District Judge Frank M. Johnson, Jr., entered an order denying Taylor leave to file his habeas corpus petition on the ground that Taylor had failed to satisfy the requirements of 28 U.S.C.A. §2254 concerning the exhaustion of available state remedies.

Taylor then filed in the Jefferson County, Alabama Circuit Court a Petition For Writ of Error Coram Nobis, on March 25, 1969, seeking post-conviction relief in the state trial court. A full and complete evidentiary hearing was conducted on the coram nobis petition on August 4, 1969, and the petition was denied by the Jefferson County, Alabama Circuit Court on September 2, 1969.

The coram nobis denial was affirmed by the Court of Criminal Appeals of Alabama on March 2, 1971. *Taylor v.*

*Alabama*, 46 Ala. App. 659, 248 So.2d 154. Taylor's Application For Rehearing was denied by the Court of Criminal Appeals on April 6, 1971. A Petition For Writ of Certiorari was then filed in the Supreme Court of Alabama, which petition was denied without opinion on May 6, 1971. *Taylor v. Alabama*, ..... Ala. ....., 248 So.2d 156.

On September 9, 1971, Taylor filed a second Petition For Writ of Habeas Corpus in the United States District Court For the Northern District of Alabama, Southern Division. On October 8, 1971, the District Court entered an order denying Taylor's habeas corpus petition.

The decision presently sought to be reviewed by the Petitioner herein is that order of the United States Court of Appeals For the Fifth Circuit which reversed the order of the District Court denying Taylor's habeas corpus petition.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court of Appeals, speaking through Circuit Judge Dyer, predicted reversal of the District Court's habeas corpus denial upon its determination that the inculpatory statements made by Taylor during the trip from Dublin, Georgia to Birmingham fell within the proscribed ambit enunciated by this Honorable Court in *Escobedo v. Illinois*, 378 U.S. 478, 12 L. ed.2d 977, 84 S. Ct. 1758, and, thus, Taylor's Sixth Amendment right to counsel was abridged.

Since Taylor's trial occurred subsequent to the decision of this Court in *Escobedo*, supra, but prior to *Miranda v. Arizona*, 384 U.S. 436, 16 L. ed.2d 694, 86 S. Ct. 1602, this case must be decided under the requirements of *Escobedo* and not those of *Miranda*. *Johnson v. New Jersey*, 384 U.S. 719, 16 L. ed.2d 882, 86 S. Ct. 1772.

In *Escobedo* this Court held the following:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect *has requested and been denied an opportunity to consult with his lawyer,* and of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment . . . . ." (Emphasis supplied.)
> 378 U.S. at p. 490.

The decision arrived at in the case at bar by the Fifth Circuit Court of Appeals after applying the above-quoted language contained in *Escobedo,* which is admittedly controlling herein, must be viewed in light of the following facts attending the incriminating statements made by Taylor to the police detectives:

(a) Taylor had retained counsel in Birmingham to represent him prior to his waiver of extradition and the return trip to Birmingham; the employment of this attorney was fully made known to Taylor by his mother in Dublin, Georgia. Taylor's attorney elected to remain in Birmingham and not to associate a Georgia attorney to personally consult with Taylor. There is absolutely nothing to indicate that Taylor's lawyer did not have available the opportunity of free access to Taylor in Dublin, Georgia had he desired to take advantage of this opportunity. Taylor was returned from Dublin to

Birmingham in the custody of Birmingham police officers with the knowledge and consent of Taylor's attorney.

(b) Taylor knew that he had the right to remain silent and not give the detectives a statement because he already had a hired attorney who had advised him through his mother that he had the right to refuse to make any statements whatsoever and that he was not in any event to make a statement to the officers.

(c) It was clear to Taylor at all times that the purpose of the return trip to Birmingham was not for interrogation but transportation of his person from Dublin to Birmingham to stand trial for the murder charge lodged against him. Taylor knew that he was not confined in the automobile so that he might be extensively questioned about the crime, but rather was there for the primary purpose of being returned to Alabama for trial.

(d) The questioning of Taylor during the return trip was periodic, not continuous.

(e) Taylor was not coerced in any way to induce him to make a statement, he was never abused or threatened nor was he offered any hope of reward to induce him to make a statement. He was not told that it would be better for him to make a statement or that it would be worse for him if he did not make a statement.

(f) Taylor was not denied food during the return trip.

(g) During the return to Birmingham there were no intimidating side trips or stops or delays of any kind.

(h) Taylor did not make his statement until they were within thirty (30) miles of Birmingham. The fact that the

detectives had, by then, been with him in the automobile for approximately eight hours and had made no threats or offers of punishment for his failure to respond to their questions about the murder, could reasonably be expected to have been reassuring, not intimidating, to Taylor. Additionally, he was by then in familiar territory and within a relatively few miles of his destination — the place where he knew he had a hired attorney to represent him in the matter which was the genesis of the questioning.

(i) Though Taylor knew he had a hired attorney to represent him, he never requested that his attorney be present with him before he answered any questions, and he was never at any time denied the right to receive advice from his hired attorney or to consult with his attorney or to have his attorney present with him before and during the answering of questions.

From the facts set forth above, it is manifestly apparent that Taylor was not, at any time, denied his right to counsel by the Birmingham Police Officers under the strictures established by this Court in *Escobedo* and that the contrary decision of the court below is palpably erroneous.

Moreover, the conclusion must necessarily follow that the decision of the Fifth Circuit Court of Appeals below is irreconcilable with the 1969 decision of this Court in *Frazier v. Cupp*, 394 U.S. 731, 22 L. ed.2d 684, 89 S. Ct. 1420. In that case the petitioner, during interrogation by the police, stated, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The questioning officer replied, "You can't be in any more trouble than you are in now," and continued the interrogation. A full confession ensued. This Court affirmed, stating:

"We do not believe that Escobedo covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in Escobedo were unmistakably informed of their suspect's wishes; in fact Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in Escobedo."
394 U.S. at p. 739.

It is obvious from this decision that this Court accords a strict construction to *Escobedo* and requires, not only an actual verbal request for counsel and a denial of the same, but further requires that the request be "clear" and "unambiguous," as was the request of Mr. Escobedo, before finding any constitutional repugnance under the rule announced in that decision.

In the instant case there is no question as to the lack of clarity or ambiguity of an actual request for counsel, but rather, there clearly was no actual request whatsoever at any time. In *Frazier*, supra, there *was* an *actual* request; here there was none. Accordingly, the decision of the Fifth Circuit Court of Appeals in the present case is in direct conflict with the decision of the United States Supreme Court in *Frazier*.

Further, the decision of the court below is similarly in conflict on this crucial point of federal law with the decision

of the Seventh Circuit Court of Appeals in *U.S. v. Childress*, 347 F.2d 448 (1965), with the decision of the Second Circuit Court of Appeals in *U.S. v. Feinberg*, 383 F.2d 60 (1965), with the decision of the Third Circuit Court of Appeals in *Billingsley v. New Jersey*, 408 F.2d 1181 (1969), and with at least two prior decisions of the Fifth Circuit Court of Appeals in *Sellars v. Beto*, 430 F.2d 1150 (1970), and *Texas v. Payton*, 390 F.2d 261 (1968).

Additionally, the decision of the Fifth Circuit is in direct conflict on the identical point of federal law with the highest court of the State of Alabama, the Supreme Court of Alabama, in *Taylor v. State*, 282 Ala. 567, 213 So.2d 566, and is in conflict with the following decisions of other state appellate courts on the same point: *Cunningham v. State*, 231 A.2d 501 (1965, Md.); *State v. Funicello*, 231 A.2d 579 (1965, N.J.); *State v. Hopper*, 203 So.2d 222 (1967, La.); *State v. Carr*, 154 N.W.2d 526 (1967, Neb.); *State v. Outten*, 206 So.2d 392 (1968, Fla.); *Edwards v. State*, 156 N.W.2d 397 (1968, Wisc.); *Short v. State*, 237 N.E.2d 258 (1968, Ind.); *People v. Doverspike*, 167 N.W.2d 285 (1969, Mich.).

*Escobedo* cases are still very much in our court systems, both via federal habeas corpus and through state habeas corpus, state coram nobis proceedings, or some other appropriate vehicle through which state post-conviction relief may be sought. See, e.g., *Loray v. Yeager*, 446 F.2d 1360 (3 Cir. 1971), *Miller v. Texas;* 468 S.W.2d 818 (1971, Tex.), and *People v. Ranes*, 188 N.W.2d 568 (1971, Mich.). *Loray v. Yeager*, supra, although a pre-*Escobedo* case, indicates the importance of the problem. Confined in both the federal and the state penal systems are a great many potential litigants with *Escobedo* issues attending their convictions, which issues are unresolved and will probably be raised in post-conviction

litigation. The question presented in this petition is one of significant general consequence to the administration of criminal justice in federal and state courts and, correlatively, to the restoration of judicial confidence in the guidance necessary from federal appellate rulings. Accordingly, it is vitally important that this Court review the decision rendered by the Fifth Circuit Court of Appeals below, which decision is undeniably in conflict with the teachings of this Court and irreconcilable with decisions rendered in other federal circuit courts of appeal, in order that this Court can rule definitively on the question presented and eradicate the obvious discord engendered by this decision.

## CONCLUSION

For the foregoing reasons this Petition For a Writ of Certiorari is due to be granted.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama

Richard F. Calhoun

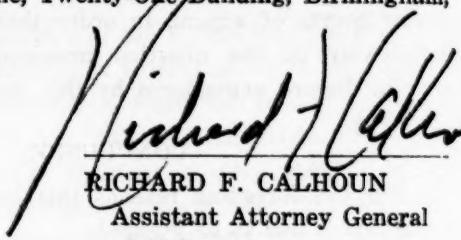
RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

Attorneys for Petitioner

**ADDRESS OF ATTORNEYS FOR PETITIONER:**
Office of the Attorney General
250 Administrative Building
Montgomery, Alabama 36104

## CERTIFICATE OF SERVICE

I, Richard F. Calhoun, one of the Attorneys for Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15 day of JUNE, 1972, I served copies of the foregoing Petition For Writ of Certiorari on Honorable Fred Blanton, Jr., by mailing said copies in a duly addressed envelope, postage prepaid, to him at: Suite 1627, Twenty-One, Twenty-One Building, Birmingham, Alabama 35203.



RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3454

LAWRENCE ERSKINE TAYLOR,
Petitioner-Appellant,

versus

M. J. ELLIOTT, Warden,
Atmore Prison Farm,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(April 14, 1972)

Before RIVES, COLEMAN and DYER,
Circuit Judges.

DYER, Circuit Judge: Taylor, an Alabama state prisoner, appeals a denial of federal habeas corpus relief from his conviction on a jury verdict of guilty of second degree murder. He claims that an incriminating statement made by him while in the custody of state police officers and without the presence of his retained counsel was constitutionally inadmissible at his trial. We reverse.

On January 13, 1965, Taylor was arrested and jailed in Dublin, Georgia in connection with a homicide that occurred a few days earlier in Birmingham, Alabama. The Birmingham police contacted the Dublin sheriff's office to arrange for the extradition of Taylor to face the Alabama charge. Taylor's mother, also in Dublin, secured a lawyer for him from Birmingham who advised her to have her son waive extradition, to tell him that he was not to make any statement to the police in connection with their accusations, and that he could not be required to make any statement without first consulting with his lawyer.

On January 15, 1965, two detectives from the Birmingham police department drove to Dublin, a distance of approximately four hundred miles, to return Taylor to Birmingham to face the charges against him. When they arrived, they took Taylor into the interrogation room of the Dublin jail to talk with him about the charge. Taylor's mother was with him. She told the detectives, while all four were in the room, that she had retained a lawyer in Birmingham for her son, that he had instructed her to tell her son to consent to return to Birmingham with the officers, but that he should in no event make any statement to the officers. In the presence of the officers, she repeated to her son the attorney's instructions that he was not to make any statement to the officers without the advice of his lawyer.

At the conclusion of the conversation and after Taylor's mother departed, the officers proceeded to question Taylor about the homicide. Following the advice he had been repeatedly given, Taylor said that he would answer no questions as directed by his attorney. At the time of this questioning, Taylor was 18 years old and had an eighth grade education.

Shortly thereafter, Taylor left by car for Birmingham in the custody of the two detectives. The trip lasted until early evening. During the trip the officers repeatedly questioned Taylor about the homicide, at times without interruption for periods of one hour. Until the final half-hour of the eight hour ride, Taylor, following his lawyer's advice, continued to refuse to talk in the absence of his lawyer. During the final half hour, however, he made statements to the officers implicating himself in the crime which were introduced, over objection, at the trial.

Taylor's trial occurred subsequent to *Escobedo v. Illinois*, 1963, 378 U.S. 478, but prior to *Miranda v. Arizona*, 1965, 384 U.S. 436, so that the requirements of *Escobedo* but not those of *Miranda* apply. *Johnson v. New Jersey*, 1966, 384 U.S. 719. In *Escobedo* the Court held that where an investigation has begun to center on a particular suspect, he is taken into custody and is interrogated, "[t]he suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . ." *Escobedo, supra*, at 491. In *Sellars v. Beto*, 5 Cir. 1970, 430 F.2d 1150, 1154, we pointed out that *Escobedo* protects the right to counsel only when it is requested.

We have no doubt, however, that such a request was clearly made in this case. The officers knew that counsel had been retained for the accused, and that counsel had advised and instructed him not to make any statements. During the decisive hours following the arrest and during seven and one half hours of the eight hour trip in the car with the two detectives Taylor refused to answer questions on advice of and in the absence of counsel. His final capitu-

lation to interrogation under these circumstances cannot make his inculpatory statements admissible in the face of such a patent violation of Taylor's Sixth Amendment right to counsel.

The judgment of the district court is reversed and the case is remanded with directions to grant the writ of habeas corpus unless the State of Alabama elects to retry Taylor within ninety days from the date of the mandate herein.

REVERSED AND REMANDED WITH DIRECTIONS.

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**No. 71-3454**

---

**LAWRENCE ERSKINE TAYLOR,**
**Petitioner-Appellant,**

**versus**

**M. J. ELLIOTT, Warden,**
**Atmore Prison Farm,**
**Respondent-Appellee.**

---

**Appeal from the United States District Court for the Northern District of Alabama**

---

Before RIVES, COLEMAN and DYER, Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions

to grant the writ of habeas corpus unless the State of Alabama elects to retry Taylor within ninety days from the date of the mandate herein;

It is further ordered that respondent-appellee pay the costs on appeal in this Court.

April 14, 1972

Issued as Mandate:

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**No. 71-3454**

---

**LAWRENCE ERSKINE TAYLOR,**
**Petitioner-Appellant,**

**versus**

**M. J. ELLIOTT, Warden,**
**Atmore Prison Farm,**
**Respondent-Appellee.**

---

**Appeal from the United States District Court for the Northern District of Alabama**

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 14, 1972, 5 Cir., 1972, ____F.2d____).

---

(May 17, 1972)

---

Before RIVES, COLEMAN and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular

active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

## APPENDIX "B"

**IN THE**
**UNITED STATES DISTRICT FOR THE**
**NORTHERN DISTRICT OF ALABAMA**
**SOUTHERN DIVISION**

---

**No. CA 71-818**

---

**LAWRENCE ERSKINE TAYLOR,**
**Petitioner,**

**vs.**

**M. J. ELLIOTT, as Warden,**
**Atmore Prison Farm,**
**Atmore, Alabama,**
**Respondent.**

## EXAMINATION, REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT JUDGE

This case has been referred to the United States Magistrate for examination, report and recommendation. The following is submitted:

Lawrence Erskine Taylor by and through his retained counsel Fred Blanton, Jr. has filed a petition for habeas corpus. By an Order heretofore entered by the Magistrate, Lawrence Erskine Taylor was permitted to proceed in forma pauperis and the State of Alabama was directed to show cause in writing why the writ should not be granted. Based upon the petition and the response filed by the State of Ala-

bama to the order to show cause, the following facts and contentions appear.

On Christmas Eve, 1964 or possibly very early on Christmas Day, James W. Rule met his death by being beat over the head numerous times with a wooden club referred to as a "billy stick". On January 14, 1965, C. L. Pierce filed an affidavit for a warrant against Petitioner for First Degree Murder in connection with the homicide resulting in the death of J. W. Rule. Based upon this affidavit, a warrant for the arrest of Petitioner for the crime of murder was issued on January 14, 1965. It is not clear from Exhibit "A" to the response filed by the State of Alabama if or when this particular warrant was executed. There is an illegible Sheriff's stamp on the back of the aforesaid Exhibit indicating some action by the Sheriff of Jefferson County on Jannary 17, 1965. There also appears on the back of said Exhibit a stamp indicating that the warrant was filed in the office of the Circuit Clerk on January 26, 1965.

On February 5, 1965, Petitioner was indicted for the offense of First Degree Murder in connection with the killing of James W. Rule.

On February 12, 1965, Petitioner, together with retained counsel, appeared for arraignment and entered a plea of not guilty and not guilty by reason of insanity. After several continuances, trial of the case commenced on the 18th of May, 1965. On May 20, 1965, the jury found Petitioner guilty of murder in the second degree and fixed his punishment at eighty (80) years imprisonment. Sentence was duly imposed by the Court in accordance with the verdict of the jury and Petitioner filed a timely notice of appeal. Petitioner was allowed to proceed in forma pauperis and his retained trial counsel was appointed to represent him on appeal.

The conviction of Petitioner was affirmed by the Supreme Court of the State of Alabama. 213 S.2d 566 (1968).

On March 25, 1969, Petitioner sought relief from the eighty year sentence he was then serving by filing an application for Writ of Error Coram Nobis in the Circuit Court of Jefferson County, Alabama. The Court appointed an experienced attorney, the Honorable Fred Blanton, Jr., to represent Petitioner in his coram nobis action. An evidentiary hearing was afforded Petitioner on August 4, 1969. After hearing the testimony, the Circuit Court for the Tenth Judicial Circuit denied relief. Petitioner appealed from the decision of the Circuit Court of Jefferson County denying coram nobis relief which said judgment was affirmed by the Court of Criminal Appeals of Alabama on March 2, 1971. 248 S.2d 154. The Supreme Court of Alabama denied certiorari on May 6, 1971. 248 S.2d 156.

Petitioner has completely exhausted the State remedies available to him. The issues raised by Petitioner in his application for federal habeas relief are now ready for a decision by this Court.

The recommendation of the Magistrate, which will follow, can probably better be understood by a brief reference to the facts involved in the conviction of Petitioner by a jury for the offense of Second Degree Murder.

Harold Raymond Leonard was also indicted for the murder of J. W. Rule. Leonard was convicted by a jury of voluntary manslaughter. On appeal his conviction was reversed because judgment was brought about by the uncorroborated testimony of accomplices. *Leonard vs. State* 192 S.2d 461. The opinion of the Alabama Court of Appeals in

*Leonard vs State* (Supra) contains a summary of the facts which occurred on Christmas Eve, 1964. Petitioner, Leonard, Hite were together in an automobile being operated by Weldon. At approximately 7:00 p.m. they drove to the vicinity of an apartment occupied by J. W. Rule. Petitioner, Leonard and Hite went to the apartment, which was at the time unoccupied. Petitioner entered the apartment through a window and admitted his confederates. The three of them took 2½ cases of whiskey, clothes, a suitcase, a television set, and a billy stick from the apartment to the automobile being operated by Weldon. With Weldon driving, the four disposed of the stolen items to a well-known "fence".

At about 10:00 p.m. the group gathered again and returned to the Rule apartment. Rule was attracted to the door of his apartment whereupon, according to the testimony, Petitioner struck Rule on the head between 9 and 13 times with the billy stick that the group had earlier stolen from Rule's apartment. When Rule became unconscious he was searched by Leonard who removed a bill fold containing approximately $100.00. The group of four divided the contents of the bill fold equally. Rule died as a result of the beating about one week later.

On January 15, 1965, Petitioner, who had been in custody of Georgia State authorities at Dublin, Georgia, was taken into custody in connection with the Rule killing by two detectives of the Birmingham Police Department. The transcript of the testimony heard in connection with Petitioner's application for coram nobis relief reflect the following. On or before January 15, 1965, Birmingham City Detective Wallace was notified that Petitioner was in custody at Dublin, Georgia. Wallace made immediate arrangements to pick up Petitioner. Wallace testified that he did not know whether

a warrant had been issued for Petitioner's arrest. This is somewhat confusing since the records reflect that such a warrant was issued on Janary 14, 1965. Detective Wallace first saw Petitioner in the County Jail, Dublin, Georgia at approximately 11:00 a.m. on January 15 , 1965. At this time Petitioner was brought to an interrogation room and his mother, Mrs. Holsumbeck was present. In the presence of Petitioner and in the presence of Detective Wallace and the officer who was accompanying him, Petitioner's mother stated that she had employed Mr. John Golden as an attorney to represent Petitioner; Mr. Golden had advised Petitioner to waive extradition but not to make a statement concerning the death of Mr. Rule. Petitioner's mother stated that she had advised her son of the fact of Mr. Golden's representation and the advice given by Mr. Golden and she repeated this advice in the presence of the officers.

Held still at a county jail in Dublin, Georgia and in the absence of Petitioner's mother, Petitioner was interrogated by the Birmingham Police Officers but he declined to answer on advice of counsel.

Shortly after the event described above, the formalities of waiving extradition were completed and the Birmingham Police Officers commenced the return journey with Petitioner in the car. During the return journey which was in excess of four hours in duration, Petitioner was periodically questioned by the Birmingham Police Officers concerning the Rule killing. Petitioner made no statement or response to such questions until approximately thirty minutes before arrival in Birmingham. At this time Petitioner made an oral confession which was testified to by the police officers at his trial. Without the confession, a conviction of Petitioner would have been impossible. Other than the confession, the

only incriminating evidence was from accomplices. In the absence of the confession, Petitioner's conviction would have met the same fate as Leonards. *Leonard vs State* (Supra) However, it is the Law of Alabama that a confession by an accused is sufficient corroboration of accomplice testimony to support a conviction. *Taylor vs State* 213 S. 24 566; *English vs State* 84 S. 2d 673

In Petitioner's direct appeal Petitioner claimed that the trial Court erroniously admitted his oral confession into evidence. Petitioner based his contention on the decision of the Supreme Court in *Miranda vs Arizona* 384 U.S. 436 and *Escobedo vs Illinois* 378 U.S. 478. The Supreme Court of the State of Alabama in an opinion by Justice Lawson held that the *Miranda* decision was inapplicable because the *Miranda* decision is not retroactve and occurred after Petitioner's conviction. The opinion of Justice Lawson further held that the facts surrounding Petitioner's confession did not bring the case within the exclusionary rule of *Escobedo.* Justice Lawson also determined from the evidence that the procedural standard set by the Supreme Court in *Jackson vs Denno* 378 U.S. 368 to determine the voluntary character of a confession had been complied with in the Court below.

Petitioner's coram nobis petition contained the following contentions as a basis for relief. (1) Inadequate representation of counsel in the original trial and on appeal (2) A denial of Petitioner's Constitutional rights resulting from the trial Judge receiving evidence tending to show that Petitioner's confession was voluntarily made within the presence of the jury. Petitioner later amended his application for coram nobis by deleting therefrom the claim of inadequate representation by counsel.

In his habeas corpus petition, Petitioner claims as a basis for federal habeas relief, that the statement taken from him was not voluntary and that the aforesaid statement was improperly received in evidence by the trial Court.

It is apparent that the issue before the trial Court and the Supreme Court of Alabama with respect to the validity of the confession and its admissibility in evidence were and are identical to the issue raised by Petitioner in his collateral attack made on his sentence in the State coram nobis action and in the federal habeas action. The identical issue was also presented to the Supreme Court of the United States by Petitioner's application for certiorari which was denied on February 24, 1969. *Taylor vs Alabama* 393 U.S. 1102 The issue before this Court is, did the interrogation of Petitioner by Birmingham Police Officers comport with the Constitutional rights of Petitioner under the Fifth and Sixth Amendments to the Constitution as those rights are described in *Escobedo vs Illinois* (Supra)? Did the procedure utilized by the trial Court in determining the voluntariness of Petitioner's confession satisfy the due process clause of the Fourteenth Amendment as prescribed by the Supreme Court in *Jackson vs Denno* (Supra)? Is an evidentiary hearing required in this Court? The Magistrate has set out the factual and procedural background in this matter in some degree so that the basis for the ultimate recommendation can be better understood. It is emphasized that the identical issue before this Court was passed on by the State trial Judge, then by the Alabama Supreme Court; this was followed by a reappraisal of this issue by the Circuit Court of Jefferson County in the coram nobis action and again by the Alabama Court of Criminal Appeals in the appeal following denial of coram nobis relief. On four occasions, State Courts and State Judges have held that the confession given by the Petitioner was

voluntary within the meaning of *Escobedo*. State Judges are obliged to apply the same principles of Constitutional guarantees in the disposition of criminal cases as Judges appointed to the Federal Bench. There is nothing to indicate any difference in competence or sincerity between State and Federal Judges. The significant issues presented to this Court have been resolved adversely to Petitioner. Were these decisions in accordance with the protection afforded Petitioner under the 5th, 6th and 14th Amendments to the United States Constitution; the Magistrate is of the opinion that they were.

The Supreme Court of Alabama in its decision on direct appeal of Petitioner's conviction found a factual difference between Petitioner's conviction and the facts surrounding the taking of a statement in *Escobedo*. This factual distinction was first noted by the trial Judge as evidenced by his admission of his confession into evidence. The Supreme Court affirmed the existence of the differing facts. The Magistrate feels that the facts in the instant case do not bring the case within the *Escobedo* umbrella. Therefore, it is the Magistrate's conclusion and opinion that the conviction of Petitioner is not Constitutionally infirm on the issue of the voluntariness of the confession.

Petitioner next contends that the trial Judge was Constitutionally required to make an independent determination of voluntariness outside the presence of the jury before submitting the entire issue of voluntariness and credibility to the jury. In short, Petitioner contends that the trial Judge failed to follow the procedure prescribed by the Supreme Court in *Jackson vs Denno* (Supra) and that this failure operated to deprive Petitioner of his Constitutional rights.

Alabama follows the so-called orthodox rule regarding the responsibility of the trial Judge to first determine whether

a confession is voluntary. *Duncan vs State* 176 S. 2d 840 The only possible basis of non-compliance with *Jackson vs Denno* (Supra) by the trial Court in Petitioner's case would be the failure of the Court to make its inquiry outside the presence of the jury. While *Jackson vs Denno* recognizes this to be the best procedure, the Magistrate does not read *Jackson vs Denno* as requiring such a hearing outside the presence of the jury in the absence of a request by the Defendant or some event which puts the trial Judge on notice that disputed testimony to include the possible testimony of the Defendant will be offered to rebute the predicate established by the prosecution.

Counsel for the Petitioner has called to the attention of the Courts of the State of Alabama and this Court the case of *Tiner vs Simpson* U.S. District Court, Middle District of Alabama CA2668-N, July 26, 1968. It appears from the opinion of Judge Frank M. Johnson, Jr. that the issue in *Tiner* - - whether the procedure for judicial determination of voluntariness was Constitutionally valid - - is identical to an issue in the instant case. The opinion further points out that *Tiner*, the Petitioner, had never been given a hearing by the State Court on the issue on whether or not his confession was voluntary. Judge Johnson did not release the Petitioner from custody in the *Tiner* case. He merely ordered that the State give him a hearing on the issue on voluntariness or a new trial. If neither of these alternatives were accepted by the State, then and only then did Judge Johnson direct Tiner's discharge.

In the case before this Court, Petitioner has been afforded an evidentiary hearing. At this hearing, Petitioner was represented by the same attorney who now represents him. Petitioner, in the coram nobis hearing, had an opportunity to

put in whatever evidence was available, including his own, to rebute the testimony of State officers that the confession was voluntary. Petitioner presented the following evidence. Testimony of his former counsel, Mr. Golden and Detective Albert Wallace and a portion of the transcript of the evidence taken at the trial of Petitioner and the testimony of the Petitioner himself. There is no substantial difference between the testimony of Petitioner at the coram nobis hearing and the testimony of Detective Wallace both at the coram nobis hearing and at the trial of the case. Petitioner was not advised of his rights in accordance with the *Miranda* rule. Such advice was not required to be given at the time Petitioner was interrogated in order to render a confession admissible. Petitioner was not coerced in any way to induce him to make a statement. Petitioner was not abused or threatened nor was he offered any hope of reward to induce him to make a statement. After hearing the evidence at the coram nobis hearing, the Circuit Court of Jefferson County concluded as did the Supreme Court of Alabama, that Petitioner's confession was voluntary as that term had been defined by the Supreme Court of the United States prior to *Miranda*. The Alabama Courts have also concluded that Petitioner was not deprived of his rights to counsel in violation of the Sixth Amendment. Unlike *Escobedo*, Petitioner was never denied the right to receive advice from his counsel or to have his counsel present. Counsel was employed for Petitioner prior to his arrest. The attorney representing Petitioner was in Birmingham and the Petitioner was under arrest in Dublin, Georgia some 400 miles away. Petitioner's attorney elected to remain in Birmingham and also not to have associate counsel in Georgia personally advise and consult with Petitioner. There is nothing to indicate that Petitioner's counsel did not have available the opportunity of free access to Petitioner in Dublin, Georgia had he desired to take advantage

of this opportunity. Petitioner was returned from Dublin, Georiga to Birmingham in custody of Birmingham Police Officers with knowledge and consent of Petitioner's attorney. (Petitioner's attorney had advised him to waive extradition.) Under the undisputed evidence the police officers of the City of Birmingham did not at any time deny to Petitioner his right to confer with his attorney.

The Magistrate is of the opinion therefore, that the interrogation of Petitioner by Birmingham Police Officers did not deprive him of any rights guaranteed by the Fifth and Sixth Amendments to the Constitution. The Magistrate is of the further opinion that the State Courts of Alabama correctly found a factual distinction which removed the instant case from the holding by the Supreme Court in *Escobedo.*

In *Jackson vs Denno* (Supra) the Supreme Court directed the trial Court in the State of New York to provide the Petitioner in that case with an evidentiary hearing to determine whether or not the confession which was introduced in evidence was voluntary and that such hearing should be conducted by the State Courts. (See pages 392, 393, 394, and 395). Even if it be conceded that the procedure for judicial determination of voluntariness in the instant case is deficient as the Supreme Court held in *Jackson vs Denno* (Supra), Petitioner has already received the evidentiary hearing which the Supreme Court directed in *Jackson vs Denno.* The Alabama Courts have held that the action taken by the trial Court in Petitioner's trial with regard to the admissibility of the confession was in accordance with the procedure outlined in *Jackson vs Denno.* The Magistrate feels that this conclusion is correct. The only area of conflict with respect to this issue is that the State trial Judge did not conduct a hearing outside the presence of the jury on the issue

of voluntariness. The Magistrate is of the opinion that such a hearing is not necessary under the facts and circumstances of this case. *Brown vs Wainwright* 394 F. 2d 154 5th Cir. (1968)

The Petitioner has been afforded a complete and fair evidentiary hearing. The factual contentions made by Petitioner were resolved in this hearing. All material facts were developed at the evidentiary hearing in the State Court. The Circuit Court of Jefferson County was the proper Court to conduct the evidentiary hearing in connection with Petitioner's coram nobis action. Petitioner was represented by able counsel in the coram nobis proceeding. No further evidentiary hearing in this Court is necessary or desirable. It is recommended that Petitioner's application for habeas corpus be denied.

Dated this 5th day of October, 1971.

R. MACEY TAYLOR
United States Magistrate

## ORDER

The Court has considered the pleadings filed in this case and the report and recommendations of the U. S. Magistrate. The Magistrate's recommendations are hereby adopted and approved.

For the reasons stated in the Magistrate's report, it is hereby ORDERED that the Petition for Habeas Corpus filed by Lawrence Erskine Taylor be and the same hereby is denied.

The Clerk is directed to furnish Petitioner with a copy of the Magistrate's report and this Order by mailing a copy of same to Petitioner's Attorney of Record. The Clerk is further directed to furnish the Honorable William Baxley, Attorney General for the State of Alabama with a copy of the Magistrate's report and this Order.

Done this 8th day of October, 1971.

SEYBOURN H. LYNNE
United States District Judge